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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICHARD CURTIS PRICE, Defendant and Appellant.	H034293 (Santa Clara County Super.Ct.No. CC936517)

The defendant, Richard Curtis Price, pleaded no contest to charges stemming from a gratuitous confrontation he and his confederates had with a passerby and the strong-arm robbery of the passerby that soon followed. He claims that probation conditions are vague and overbroad and suffer from other constitutional defects and that a minute order does not reflect the trial court's orally announced disposition. We will modify one probation condition to cure any constitutional infirmity and others for the prudential purpose of making them clearer. In addition, we will order stricken a putative gang registration provision that the trial court did not impose orally. With those modifications, we will affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Because defendant pleaded no contest, we take the facts from the probation report. Late in the evening of February 26, 2009, defendant and three cohorts were near a San Jose shopping mall. They challenged a passerby by asking him what he was looking at.

The passerby asked what their problem was and told them to leave him alone. Members of defendant's group rejoined that the passerby had a problem and the group followed him to a Valley Transportation Authority light-rail station. The group's members sat near him during the train ride and, when he alighted, followed him and set upon him, beating him and knocking him to the ground. During the fracas the assailants stole the victim's wallet. Later the robbers used the victim's debit card to spend a total of about $83 at a market. The police suspected they knew the identities of some of the assailants and also obtained surveillance videos. They prepared a photographic lineup and on inspecting it the victim identified all four of his attackers. Defendant was arrested soon thereafter.

Defendant pleaded no contest to second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c))[1] and access card forgery (§ 484f, subd. (b); see §§ 470, 473), both felonies. The trial court sentenced him to three years' formal probation, one condition of which was to serve one year in jail.

The victim declined to appear at the sentencing hearing. He told the probation officer that he feared retaliation from his assailants and their confederates and asked the trial court to impose stay-away orders.

Defendant told the probation officer, as relevant here, that he had had a troubled childhood and had identified with the Norteño criminal street gang "from an early age." "He went on to say he is 'finished with gangs,' and as a result, he has been placed in protective custody . . . because the jail staff believe he is at risk of attack." "He said it would be very necessary for him to leave Santa Clara County in order to get away from the gang life and his former associates. . . . [H]e . . . has . . . thought about going into the Army . . . . He reiterated he is tired of being in the gang life and wants to 'get far away from it.' "

[1] Further statutory references are to the Penal Code.

The probation reports shows that defendant, who was 27 years old at the time, had suffered one felony conviction and 22 misdemeanor convictions prior to his convictions for the current felonies. The probation officer concluded, "The behavior of the defendant in this offense is nothing short of hoodlumish and is characteristic of the defendant's life up to this point. On the other hand, the defendant expressed a desire to leave his past as a gang member behind him and change for the better. . . ."

DISCUSSION

I. *Constitutionality of Gang-related Probation Conditions*[2]

Defendant claims that the gang-related probation conditions the trial court imposed are unconstitutional in a number of aspects. Generally he maintains that the probation conditions are vague and overbroad and are unjustified by any legitimate state interest. Specifically he claims that conditions concerning gang indicia infringe on his right to free speech under the First and Fourteenth Amendments and fail to provide adequate notice of what is prohibited, in violation of due process guaranties; a stay-away condition interferes with his constitutional rights to travel and, as he discerns his rights, remain in a particular place, along with his associational rights under the First and Fourteenth Amendments to the United States Constitution; a condition restricting his ability to attend court proceedings infringes on his right to free speech; and a condition requiring him to register as a gang member must be set aside.

Over defendant's general objection to the imposition of any gang-related probation conditions, the trial court directed in open court that defendant do as follows: "The Court will order that Mr. Price not possess or display any item of clothing or tattoo—acquire

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[2] Defendant did not obtain a certificate of probable cause. Nevertheless, defendant's claims regarding gang-related probation conditions may be entertained on appeal notwithstanding the lack of a certificate; they were imposed after entry of defendant's no contest pleas and as far as the record reveals they were not part of the plea bargain. (*People v. Narron* (1987) 192 Cal.App.3d 724, 730.)

new gang tattoos—caps, bandanas, scarves, jackets, shirts which are indicia of gang membership. And avoid all persons that he knows to be gang members." The court later elaborated on the foregoing general description of applicable probation conditions. "[Y]ou are ordered not to knowingly associate with individuals known to be members of a criminal street gang or knowingly associate with individuals identified as gang members by the probation department. Do not frequent any areas of gang-related activity, and do not participate in any gang activity as directed by the probation officer. Do not use[,] display or possess any indicia, emblem, button, badge, cap, hat, scarf, bandana, jacket, or other article of clothing, or any other item which is evidence of—with, rather, or membership in a criminal street gang as directed by the probation officer. [¶] Do not be on or adjacent to any school campus during school hours unless enrolled or with prior administrative permission or prior permission of the probation officer. [¶] Do not obtain any new gang-related tattoos as directed by the probation officer. And do not appear in a court proceeding unless a party or a defendant in a criminal action or subpoenaed as a witness or with the prior permission of the probation officer." In addition, the clerk's minute order contains a provision purporting to order defendant to register as a gang member.

A. *Gang Indicia*

As stated, defendant claims that conditions concerning gang indicia are vague and overbroad, infringe on his free-speech rights under the First and Fourteenth Amendments, and fail to provide adequate notice of what is prohibited, in violation of due process guaranties.

To repeat, the trial court ordered: "Do not use[,] display or possess any indicia, emblem, button, badge, cap, hat, scarf, bandana, jacket, or other article of clothing, or any other item which is evidence of—with, rather, or membership in a criminal street gang as directed by the probation officer." "Do not obtain any new gang-related tattoos as directed by the probation officer."

A reviewing court reviews a trial court's imposition of a probation condition under one of two different standards. The applicable standard depends on the condition's effect on a defendant's civil liberties. " '[A] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) All others are reviewed for abuse of discretion, i.e., "[w]e do not apply such close scrutiny in the absence of a showing that the probation condition infringes upon a constitutional right. . . . [and] absent such a showing . . . simply review[ ] such a condition for abuse of discretion, that is, for an indication that the condition is 'arbitrary or capricious' or otherwise exceeds the bounds of reason under the circumstances." (*Ibid.*) The court may "impose conditions to foster rehabilitation and to protect public safety." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) No abuse of discretion is likely to be found unless the following three conditions all are satisfied: the probation condition " ' "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." '[Citation.] " (*Olguin*, at p. 379.)

It is the oral pronouncement of probation conditions that informs a defendant's probation terms (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2), and on appeal it is the oral pronouncement we must consider (*ibid.*) for any constitutional infirmities or, when a constitutional principle is not involved, abuse of discretion under state law.

" 'A probation condition is subject to the "void for vagueness" doctrine . . . .' " (*In re H.C.* (2009) 175 Cal.App.4th 1067, 1070.) The " 'underlying concern' " of the void for vagueness doctrine " 'is the core due process requirement of adequate *notice*. [¶] "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." [Citations.]' " (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115; accord, *In re*

Sheena K. (2007) 40 Cal.4th 875, 890.) In sum, "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*Sheena K.*, at p. 890.)

As for overbreadth, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

As noted, defendant claims that conditions concerning gang indicia are vague and overbroad. His due process claim essentially depends on his vagueness and overbreadth claims. He suggests that because the number 14 and red are associated with the Norteño gang (see *In re Jose P.* (2003) 106 Cal.App.4th 458, 467) he might not be able to possess "a book with at least 14 pages, a red stapler, or raspberries."

In our view, the orally pronounced set of gang-indicia probation conditions does not suffer from any constitutional infirmity. A knowledge element was implied in the context of the trial court's announcement of the conditions.

For a probation condition to meet constitutional requirements and/or survive challenge under the abuse of discretion standard when constitutional norms are not implicated, it suffices if the probation condition is understandable even though it can always be made more precise. The condition need only " 'be sufficiently precise for the probationer to know what is required of him.' " (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) The trial court suffused its listing of the probation conditions with a knowledge requirement, by direct use of the relevant verb at the beginning of its list of rules to be followed, and by means of the language referring defendant to the probation officer, who by implication is charged with giving defendant the requisite knowledge. If defendant does not know that some nonobvious item constitutes a gang-related indication and the probation officer does not tell him, defendant will not have violated his probation. As for

obvious gang indicia, the conduct prohibited is stated with sufficient precision, particularly because defendant is not a neophyte with regard to gang indicia and may be expected to know what displays are sufficiently provocative to come within the restrictions.

"A probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' " (*People v. Olguin*, *supra*, 45 Cal.4th at p. 382.) This should allay defendant's concerns that he may be sanctioned for possessing, e.g., raspberries. Were it otherwise, similar absurdities would result throughout the state. Absent reasonable application of the probationary rules, paying with a dollar bill might be a problem for any Sureño who is directed to avoid displaying the number 13 (see *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1206, fn. 3) because the pyramid on the back of the dollar bill, below the Eye of Providence and the legend "Annuit Cœptis," contains 13 strata. In sum, this argument is a *reductio ad absurdum*.

Nor was the trial court required to elaborate repeatedly on the meaning of the term "gang" in connection with this subclaim and defendant's other subclaims. The court began its list of required conditions by referring to the gangs in question as "criminal street gangs." As we read the order, that qualification is imputed to all other uses of "gang" therein. In other words, "[h]ere, when 'gang' is considered in the context in which it is found in [the] condition . . . and with regard for the purpose of the provision in which it is found, it is apparent the word was intended to apply only to associations which have for their purpose the commission of crimes." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 631-632.) Given the context of the proceedings, including the court's opening clause and defendant's own acknowledgment of his involvement with a criminal street gang, defendant is deemed to understand that the court's reference was to criminal street gangs.

Beyond the criminal street gang specification, a matter the trial court already dealt with satisfactorily, "gang" requires no further definition. Any attempt to engage in such endeavors would end in circularity.

Nevertheless, because, as we discuss below, we are modifying the courthouse-attendance probation condition, we will also modify the gang-indicia order to make clear that it applies to indicia that defendant knows about or about which his probation officer alerts him. We will do this for prudential reasons, namely to make clearer the condition's knowledge requirement, even though the trial court, as noted, suffused its listing of the probation conditions with a knowledge requirement. We will change the language to read: "Do not use, display or possess any emblems, buttons, badges, caps, hats, scarves, bandanas, jackets, other articles of clothing, or other indicia that you know to be evidence of membership in a criminal street gang or that the probation officer tells you constitute such evidence. Do not obtain any tattoos that you know to be related to a criminal street gang or that the probation officer tells you are related to a criminal street gang."[3]

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[3] The written minute order directed: "GANG ORDERS: no insignia, tattoos, emblem, button, badge, cap, hat, scarf, bandanna [*sic*], jacket, or other article of clothing which is evidence of affiliations with/or membership in a gang, no association with gang members, not frequent any areas of gang related activity." As stated, however, we consider only the governing orally pronounced conditions for constitutional infirmities. "The record of the oral pronouncement of the court controls over the clerk's minute order . . . ." (*People v. Farell*, *supra*, 28 Cal.4th at p. 384, fn. 2; cf. *People v. Hatch* (2000) 22 Cal.4th 260, 274 [conflicts in the clerk's and reporter's transcripts regarding the meaning of a dismissal under section 1385 should be resolved on a case-by-case basis].) That is so because it is not the superior court but the court clerk who generates the minute order; the order's preparation is not a judicial function, whereas the pronouncement of judgment is a judicial function. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Nevertheless, given that we are directing the trial court to modify the oral probation conditions, we will also direct that it modify the written order.

B. *Right to Travel and Remain in Place*

Defendant argues that the court's stay-away restrictions, i.e., orders not to frequent areas of gang-related activity and avoid gang activities as directed by the probation officer, are unconstitutionally vague and overbroad and violate his constitutional right to travel and what he identifies as a right to "loiter," i.e., remain in place, for innocent purposes.

As described, the court ordered defendant: "Do not frequent any areas of gang-related activity, and do not participate in any gang activity as directed by the probation officer."

We acknowledge defendant's point that probation conditions that limit the exercise of constitutional rights must be closely tailored (*People v. Olguin, supra*, 45 Cal.4th at p. 384) to meet legitimate ends. We have said the same ourselves: probation conditions implicating constitutional rights must be "closely tailored to achieve legitimate purposes." (*People v. Leon* (2010) 181 Cal.App.4th 943, 951.)

The order prohibits, as we read it, only conduct that defendant's probation officer reasonably informs him to be impermissibly (meaning substantially) gang-related, a major limitation on the provision's scope. This is a facial challenge and in the absence of evidence that the probation officer is going to exercise discretion in an arbitrary fashion—such as telling defendant to avoid a large part of the county because one gang-related incident occurred in that area years ago—we are not authorized to disapprove it in anticipation of what might occur. As stated, "[a] probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' " (*People v. Olguin, supra*, 45 Cal.4th at p. 382.) On a facial challenge to a probation condition, a reviewing court assumes that a probation officer will not apply it in an arbitrary or capricious manner. (See *id*. at p. 383.) In *Olguin*, the defendant may have presented a parade of horribles regarding a probation condition requiring him to inform the probation officer about any pets he possessed. (See *id*. at pp. 382-383.) *Olguin* noted that the trial court had imposed

the condition not because the defendant was convicted of an animal-related crime but because a dangerous dog might interfere with probationary searches. (*Id*. at pp. 380-382.) *Olguin* observed that the condition "encompasses the gamut of pets from puppies to guppies." (*Id*. at p. 383.) Nevertheless, "it is not alleged that any probation officer has taken any action restricting defendant's ability to own or keep a pet at his residence. It therefore is speculative on this record to define the scope of a probation officer's supervisory authority under the notification condition in responding to a notice concerning a pet. Defendant challenges the condition on its face, but on its face the condition simply requires notification that reasonably provides the probation officer with information designed to assist in the supervision of defendant while he is on probation. What action the officer may choose to take once he or she receives information concerning a pet—whether to be accompanied by animal control officers during any search, to request that defendant detain or relocate a pet during a search, or to petition the trial court for modification of the terms of defendant's probation—is beyond the scope of a facial attack on the notification condition itself." (*Ibid.*; cf. *People v. Leon*, *supra*, at p. 954 [" 'entirely open-ended' " probation condition contingent ab initio on probation officer's grant of permission is constitutionally questionable if it allows officer to exercise untrammeled discretion to determine the scope of permissible activity].) Similar considerations apply here.

Nevertheless, the condition should be as narrowly tailored as possible. "It would be altogether preferable to name the actual geographic area that would be prohibited to the [probationer]." (*In re H.C.*, *supra*, 175 Cal.App.4th at p. 1072.) Thus, if the probation officer can aid the trial court in fashioning an order that specifies particular areas, the court should do so, unless the boundaries of those areas are fluid and too much specification in the order will require the order's continual modification, as opposed to the more flexible procedure of the probation officer telling defendant not to visit particular places at particular times given the current state of affairs. Also, for the reasons

discussed above, it is prudent to revise the condition "to say that the [probationer] not visit any area known to him to be a place of gang related activity." (*Ibid.*) We will revise the language of the probation condition in terms set out *post*, page 13.

We turn to defendant's claim that the order infringes on constitutional rights he enjoys to travel and to remain in place for innocent purposes.

A probationer does not enjoy the same constitutional rights as someone who has not offended and who has received the privilege of probation in lieu of a commitment to jail or prison. "[P]robation is a privilege and not a right, and . . . probationers, in preference to incarceration, . . . may consent to limitations upon their constitutional rights—as, for example, when they agree to warrantless search conditions." (*People v. Olguin, supra*, 45 Cal.4th at p. 384.)

We see no constitutional infirmities. Defendant argues that in theory there is no limit on "how much area would be covered. Gangs have claimed entire areas of cities to be their territory. [Citation.] Is a gang member living in an apartment building sufficient activity for the area to be off-limits? If so, what area is off-limits: the building? [T]he block? [E]verywhere within 2000 feet?"

Defendant's painting of a repressive scenario is unpersuasive, however, because he presents it prematurely, i.e., there is no evidence on the face of the condition that it will be applied in an absurd or unduly onerous manner. As stated, "[a] probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' " (*People v. Olguin, supra*, 45 Cal.4th at p. 382.) On a facial challenge to a probation condition, a reviewing court assumes that a probation officer will not apply it in an arbitrary or capricious manner. (See *id*. at p. 383.) "What action the officer may choose to take . . . is beyond the scope of a facial attack on the notification condition itself." (*Ibid.*) The condition here compels defendant to avoid visiting areas that his probation officer tells him to avoid. There is no indication on this record that the probation officer is going to impose travel and loitering restrictions so onerous as to effectively banish

defendant from the comforts of home and of association with people other than gang members. Courts have disapproved such banishments on constitutional grounds before. (*In re James C.* (2008) 165 Cal.App.4th 1198, 1205 [probation condition banishing United States citizen from the United States unconstitutional]; *Alex O. v. Superior Court* (2009) 174 Cal.App.4th 1176, 1178, 1181, 1182-1183 [probation condition barring United States citizen from the United States except for a few precise purposes amounts to an unconstitutional banishment]; *In re White* (1979) 97 Cal.App.3d 141, 145-150 [accepting defendant's argument that condition banning her from parts of Fresno she needs to access amounts to banishment and finding the restrictions "unusual and severe" and unconstitutionally overbroad].)[4] It has long been the rule that probation conditions of banishment are prohibited for various policy reasons. (*People v. Blakeman* (1959) 170 Cal.App.2d 596, 597-598; *In re Scarborough* (1946) 76 Cal.App.2d 648, 649-650.) Hence, the probation officer should not impose restrictions amounting to banishment. On its face, however, the condition does not call upon the probation officer to do so. On this facial challenge, we discern no constitutional violation.

Nevertheless, because, as we discuss below, we are modifying the courthouse-attendance probation condition, and because we endorsed clarity on this point in *In re H.C.*, *supra*, 175 Cal.App.4th at page 1072, we will also modify the stay-away order to make clear that it applies to areas that defendant knows about or about which his probation officer alerts him, and we will encourage the trial court to specify particular areas if able to do so without undue judicial diseconomy. We will do this for the prudential reasons mentioned in our discussion of gang indicia, namely to make clearer the condition's knowledge requirement, even though, as regards defendant's mental state,

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[4] Moreover, *In re White*, *supra*, 97 Cal.App.3d 141, is of dubious vitality in light of *People v. Olguin*, *supra*, 45 Cal.4th 375, and other modern decisions.

the trial court suffused its listing of the probation conditions with a knowledge requirement, either by direct use of the relevant verb or by means of the language referring defendant to the probation officer, who by implication is charged with giving defendant the requisite knowledge. Thus, regarding the knowledge requirement, we will change the language to read: "Do not visit any areas that you know to incur gang activity or any areas that your probation officer tells you incur gang activity, and do not knowingly participate in any gang activity or in any activity that your probation officer tells you is a gang activity."[5] In addition, if it is possible for the court to specify relevant areas without undue judicial diseconomy it should do so.

C. *Barring Defendant From the Courthouse*

One of the trial court's probation conditions told defendant that he must "not appear in a court proceeding unless a party or a defendant in a criminal action or subpoenaed as a witness or with the prior permission of the probation officer." In *People v. Leon*, *supra*, 181 Cal.App.4th at pages 951 to 954, we held an almost identically worded prohibition, and broad courthouse bans generally, to be constitutionally dubious (*id*. at pp. 951-953) and ordered the probation condition modified to specify: " 'You shall not be present at any court proceeding where you know or the probation officer informs you that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless you are a party, you are a defendant in a criminal action, you are subpoenaed as a witness, or you have the prior permission of your probation officer." (*Id*. at p. 954.) We will issue a similar order here.

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[5] Given that "we glean from the record that the trial court intended [defendant] not to visit such areas at all" (*In re H. C.*, *supra*, 175 Cal.App.4th at p. 1072) and that to frequent means to visit habitually, a condition that likely is unenforceable (see *ibid.*), we will substitute "visit" for "frequent."

D. *Validity of Gang Registration Requirement*

Defendant claims that a putative gang registration requirement is invalid because the trial court never pronounced it orally and, in violation of his constitutional rights, it was imposed in absentia and he was given no opportunity to contest the imposition with or without counsel present. (See *In re Cortez* (1971) 6 Cal.3d 78, 88.)

As noted *ante*, page 8, footnote 3, the clerk's minute order contains a gang registration provision. (See § 186.30.) In its oral pronouncement of judgment, however, the trial court did not require defendant to register as a gang member. It is, as we have observed, the oral pronouncement of probation conditions that sets a defendant's probation terms (*People v. Farell*, *supra*, 28 Cal.4th at p. 384, fn. 2); by itself the minute order is a nullity. Moreover, defendant had no opportunity to contest the putative condition.

The People argue that there is sufficient evidence of a gang connection to defendant's crimes (see § 186.30, subd. (b)(3)), i.e., "[t]he crime itself [has] some connection with the activities of a [statutorily defined criminal street] gang" (*People v. Martinez* (2004) 116 Cal.App.4th 753, 761) and therefore defendant is required to register as a gang member (see *id*. at p. 759). They recommend that we remand the case so that the trial court may impose the gang registration condition. In turn, defendant argues that such a procedure is unauthorized by state law and would violate his constitutional rights.

We cannot accede to the People's request. "[R]egistration is an onerous burden that may result in a separate misdemeanor offense for noncompliance . . . ." (*People v. Martinez*, *supra*, 116 Cal.App.4th at p. 760.) The fact is that the trial court never imposed the requirement—only the clerk, in all probability inserting boilerplate gang-related language into a minute order, purported to do so. There was no provision in the judgment that imposed the gang registration requirement. If the People objected to the judgment's lack of such a provision, the prosecutor was required to raise the issue at sentencing or, failing that, the People were required to seek in a timely manner a writ imposing the

condition. (§ 1238, subd. (d).) To be sure, such a writ might have been procedurally barred for failure to raise the issue at trial; we express no opinion on the matter. More to the point, however, the People's request, if granted at this juncture, would penalize defendant for raising on appeal the question of the clerk's putative imposition of a gang registration requirement. Defendant is correct that it would impermissibly burden and tax his statutory right to appeal under the circumstances of this case (§ 1237) for the trial court later to be able to impose this "onerous burden" (*Martinez*, at p. 760) on him when it did not do so in rendering judgment.

We reach this conclusion notwithstanding that as far as the Sixth Amendment's jury trial guaranty is concerned gang registration has been held not to be punishment. (*In re Jorge G*. (2004) 117 Cal.App.4th 931, 942.) The point is not whether section 186.30 imposes punishment for one constitutional purpose or another (cf. *People v. Hanson* (2000) 23 Cal.4th 355, 357 [constitutional double jeopardy prohibition forbids imposing more severe "punishment" on resentencing following successful appeal]), but whether the procedure the People urge, as the United States Supreme Court observed in the context of a constitutional right, would "cut[ ] down on the privilege by making its assertion costly." (*Griffin v. California* (1965) 380 U.S. 609, 614.)

Considering a similar problem, *People v. Henderson* (1963) 60 Cal.2d 482 held that to sentence a murderer to death following his successful appeal from a judgment leading to a life sentence (*id*. at p. 495) violated constitutional double jeopardy principles (*id*. at p. 496). Pertinent here is *Henderson*'s observation that "[s]ince the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal." (*Id.* at p. 497.)

For the foregoing reasons, we would find it untenable to burden defendant's exercise of his statutory right to appeal whether or not the gang registration requirement constitutes punishment for certain constitutional purposes. It suffices that the requirement constitutes an "onerous burden" (*Martinez*, at p. 760). (See *Spevack v. Klein*

(1967) 385 U.S. 511, 515 [forbidding "the imposition of any sanction" that makes exercising the constitutional right found in *Griffin v. California, supra,* 380 U.S. 609, " 'costly' "].)

Accordingly, we will direct that the provision in the minute order putatively requiring defendant to register as a gang member under section 186.30 be stricken.

DISPOSITION

1. The trial court is directed to modify the following probation condition:

"Do not use display or possess any indicia, emblem, button, badge, cap, hat, scarf, bandana, jacket, or other article of clothing, or any other item which is evidence of . . . membership in a criminal street gang as directed by the probation officer." "Do not obtain any new gang-related tattoos as directed by the probation officer."

to provide essentially as follows:

"Do not use, display or possess any emblems, buttons, badges, caps, hats, scarves, bandanas, jackets, other articles of clothing, or other indicia that you know to be evidence of membership in a criminal street gang or that the probation officer tells you constitute such evidence. Do not obtain any tattoos that you know to be related to a criminal street gang or that the probation officer tells you are related to a criminal street gang."

2. The trial court is further directed to modify the following probation condition:

"Do not frequent any areas of gang-related activity, and do not participate in any gang activity as directed by the probation officer."

to provide essentially as follows:

"Do not visit any areas that you know to incur gang activity or any areas that your probation officer tells you incur gang activity, and do not knowingly participate in any gang activity or in any activity that your probation officer tells you is a gang activity." Moreover, if the trial court is able to fashion an order naming particular areas without unduly burdening the court, it should do so.

3. The trial court is further directed to modify the following probation condition:

"[D]o not appear in a court proceeding unless a party or a defendant in a criminal action or subpoenaed as a witness or with the prior permission of the probation officer."

to provide essentially as follows:

"Do not be present at any court proceeding where you know or the probation officer informs you that a member of a criminal street gang will be present or that the proceeding concerns a member of a criminal street gang unless you are a party, you are a defendant in a criminal action, you are subpoenaed as a witness, or you have the prior permission of your probation officer."

4. The trial court is further directed to order the superior court clerk to amend the attachment page to the minute order of May 22, 2009, that page found at page 22 of the clerk's transcript, so as to conform it to the foregoing modifications and to remove the provision that defendant must register as a gang member.

As so modified, the judgment is affirmed.

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Duffy, J.

WE CONCUR:

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Rushing, P. J.

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Premo, J.